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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

Supreme Court, U.S.
FILED
DEC 7 1983
ALEXANDER L. STEVAS
CLERK

PERCY LEO DOBARD,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant certiorari to review questions that were neither presented to nor reviewed by the state appellate courts below?

2. Should this Court grant certiorari to determine whether the standards it promulgated in Witherspoon v. Illinois, 391 U.S. 510 (1968), were properly applied in a single case, a question which is certain to be decided in a 28 U.S.C. §2254 proceeding involving the case if this Court denies certiorari?

3. Should this Court grant certiorari to determine whether a state supreme court misapplied state law precedents, violated state constitutional principles, and engaged in analysis forbidden by state law?

PARTIES

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OPINIONS BELOW

The statement of the opinions below contained in the certiorari petition is correct.

JURISDICTION

The decision of the Alabama Supreme Court affirming petitioner's conviction and sentence occurred on July 8, 1983, and rehearing was denied on August 5, 1983. Justice Powell extended the time for filing a certiorari petition to November 3, 1983.

This Court has jurisdiction under 28 U.S.C. §1257(3) to review the second question raised in the certiorari petition, the one involving application of Witherspoon v. Illinois, 391 U.S. 510 (1968). However, this Court does not have jurisdiction to review the other questions raised in the certiorari petition, because they were neither presented to nor decided by the state appellate courts below.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statement of constitutional and statutory provisions involved which is contained in the certiorari petition is correct.

STATEMENT OF THE CASE

The facts of the crime, as found by the Alabama Court of Criminal Appeals, are as follows:

> Some time between 5:00 a.m. and 6:00 a.m. on Saturday, June 21, 1980, O'Jim's Restaurant in Eutaw, Alabama was robbed by appellant and a female companion, Jeanette Kennedy. After Kennedy left the restaurant, appellant pulled a pistol on waitress Corethea Hitton and demanded "give me all your money." Ms. Hitton complied with the demand. Appellant and Kennedy speedily fled, and Ms. Hitton called the Eutaw Police.
>
> About 35 miles from the scene of the robbery, appellant, who was driving the getaway vehicle, was spotted by Livingston University Police Officer Wayne Sudduth, who was assisting in the search for the suspects. Officer Sudduth was aware that the robbery had occurred and apparently had knowledge of the description of the getaway vehicle from a police radio broadcast.
>
> Officer Sudduth informed Livingston Police Officer Raymond Burne that he was stopping the vehicle. Officer Sudduth, who was dressed in a blue uniform, was driving a marked police car.
>
> With his flashing lights on, Officer Sudduth stopped the vehicle which contained appellant and Kennedy. He approached the driver's side of the car and asked for appellant's driver's license. Appellant opened the car door and reached around as if to get his billfold. However, according to the testimony of witness Kennedy, rather than removing his billfold he grabbed a .38 caliber revolver and shot Officer Sudduth, killing him. The evidence indicated that Officer Sudduth did not have his service revolver drawn, as it was found in his holster with the safety strap in place.
>
> After the shooting of Officer Sudduth, appellant and Kennedy sped away, only to wreck their vehicle on the western edge of Livingston. Both exited the car and walked up the road where they hid in some bushes until a truck driven by Mr. Johnny Mathews approached. Mathews saw appellant come from under a bridge and act as if he were injured. Mathews stated that appellant was yelling for help and he stopped his truck on the side of the road. When appellant came within close proximity of the truck, he pulled the revolver, pointed it at Mathew's face and demanded the keys to the truck.

> After a brief period of time, during which Sumter County Deputy Sheriff Ralph Rainey drove past appellant, Kennedy, and Mathews, appellant secured the keys and fled with Kennedy.
>
> Deputy Rainey reported what he had seen to the Livingston Police Department and was informed that he had observed the restaurant robbery suspects. Deputy Rainey set a roadblock and while moving his patrol car to allow a vehicle to pass, appellant drove Mathew's truck past him. A high speed chase ensued involving several vehicles.
>
> Another roadblock had been set by York city police officers about halfway between Livingston and York. As the truck approached, the officers at the roadblock began to fire at it. Immediately thereafter, the truck wrecked and overturned. Subsequently, Deputy Rainey saw appellant throw a gun out of the truck cab. Deputy Rainey immediately retrieved it. Appellant and Kennedy were taken into custody, transported to a local hospital for examination, and afterwards taken to Sumter County Jail.

Dobard v. State, 435 So.2d 1338, 1339-1340 (Ala. Cr. App. 1982). The Alabama Supreme Court expressly adopted those factfindings, Ex parte Dobard, 435 So.2d 1351, 1353-1354, and added its own factfinding that:

> Overwhelming evidence of record shows that Dobard pulled the trigger, firing the shots that killed Officer Sudduth. ...

Id., at 1357.

Petitioner was indicted for and convicted of the Code of Alabama, 1975, §13A-5-31(a)(5) capital offense of murdering a police officer while the officer was on duty. Dobard v. State, 435 So.2d at 1339. After a separate sentence hearing, the jury returned a verdict fixing petitioner's sentence at death. Id. Following another sentence proceeding before the trial court judge, the trial court sentenced petitioner to death. Id.

Petitioner's conviction and sentence were affirmed by the Alabama Court of Criminal Appeals, Dobard v. State, 435 So.2d 1338 (Ala. Cr. App. 1982), and by the Alabama Supreme Court, Ex parte Dobard, 435 So.2d 1351 (Ala. 1983).

The question involving application of Witherspoon v. Illinois, 391 U.S. 510 (1968), which is raised in the certiorari petition, Pet. at 13-21, was presented to and addressed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. Dobard v. State, 435 So.2d 1338, 1341-1342 (Ala. Cr. App. 1982), aff'd, 435 So.2d 1351, 1355 (Ala. 1983). Neither of the other two questions raised in the certiorari petition, Pet. at 10-13 and 21-26, were presented to or addressed by either the Alabama Court of Criminal Appeals or the Alabama Supreme Court.

SUMMARY OF ARGUMENT

The nationwide proportionality review issue raised in the certiorari petition was neither raised in nor decided by the Alabama Court of Criminal Appeals or the Alabama Supreme Court. The issue of whether due process principles required the trial court to conduct a hearing into jury exposure to media coverage of the attempted assassination of the President raised or decided below, either. Therefore, this Court should not grant certiorari to review those issues, and indeed it has no jurisdiction to do so.

The issue of whether the standards promulgated by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), were misapplied to a prospective juror in this case was raised in the state appellate courts below. However, that issue is not one worthy of this Court's scarce certiorari resources, particularly since it will be reviewed and decided in the 28 U.S.C. §2254 proceeding which will inevitably follow a denial of certiorari by this Court.

ARGUMENT

I. THE NATIONWIDE PROPORTIONALITY ISSUE WAS NEITHER RAISED IN NOR DECIDED BY THE COURTS BELOW

Alabama appellate courts conduct proportionality review of death sentences. The scope of that review was outlined in Beck v. State, 396 So.2d 645 (Ala. 1980), in which the Alabama Supreme Court mandated:

> To insure that sentences of death will not be arbitrarily and capriciously imposed, we hold that both the Court of Criminal Appeals and this Court should examine all death sentences in light of the standards and procedure approved in Gregg. Each death sentence should be reviewed to ascertain whether the crime was in fact one properly punishable by death, whether similar crimes throughout the state are being punished capitally and whether the sentence of death is appropriate in relation to the particular defendant. In making this final determination, the courts should examine the penalty imposed upon the defendant in relation to that imposed upon his accomplices, if any.

Id., at 664.

In this case, the Alabama Court of Criminal Appeals conducted extensive review of the appopriateness of petitioner's sentence, Dobard v. State, 435 So.2d 1338, 1344-1347 (Ala. Cr. App. 1982), and during that review concluded that the death penalty "has been consistently applied in similar cases" in Alabama, id., at 1345. The Alabama Supreme Court reached the same conclusion. Ex parte Dobard, 435 So.2d 1351, 1357-1358 (Ala. 1983).

It is true, as petitioner asserts, that neither Alabama appellate court compared the sentence he received to the sentence received for similar crimes in any other state. However, petitioner did not ask either Alabama appellate court to conduct nationwide proprotionality review, nor did he raise the issue of whether that type of proportionality review was required before either appellate court. The issue of whether the Eighth or Fourteenth Amendment requires that

proportionality review of capital sentencing include consideration of similar cases arising in other states was raised by petitioner for the first time in the certiorari petition he has filed in this Court. Indeed, petitioner does not contend to the contrary. While he does say that he raised "the issue of proportionality on appeal," Pet. at 12, he does not and cannot say that he raised the nationwide proportionality issue he is asking this Court to consider. In any event, when a state appellate court fails to pass on a particular federal question, this Court has said it will presume that that failure was due to the want of proper presentation unless the petitioner can show to the contrary. Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974); Street v. New York, 394 U.S. 576, 582 (1969).

Because petitioner did not present the nationwide proportionality issue to the state appellate courts below and it was not decided by them, this Court need not decide it, Moore v. Illinois, 408 U.S. 786, 799 (1972); should not decide it, Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974); and has no jurisdiction to decide it, Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); see, 28 U.S.C. §1257(2) and (3).

II. THE WITHERSPOON ISSUE DOES NOT NOT PRESENT A COMPELLING CASE FOR EXERCISE OF THIS COURT'S SCARCE CERTIORARI RESOURCES

On pp. 14 - 18 of the petition, petitioner argues that prospective juror Cannon was excused in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). In the Alabama Court of Criminal Appeals, petitioner contended that two prospective jurors, one of which was venireman Cannon, were excused contrary to Witherspoon. The appellate court answered that contention as follows:

> As to prospective juror Cannon, the record reveals the following (R. 256-257):

"MR. WATKINS [Prosecutor]: Yes, sir. Ladies and Gentlemen, the Judge has already qualified you on capital punishment, but I would like to go into it a little bit further to make sure that we understand each other.

"This case that we are going to try is one of the cases enumerated in the statute that says that a person may receive death if you find him guilty of a certain offense; and, I want to know if we all understand each other, that each of you are telling me individually, that if you believe beyond a reasonable doubt and to a moral certainty the necessary elements to return a verdict, which would mean that this person would be put to death by electrocution, that you would be able to do that? Is that what everybody is telling me? Is there anybody that would not be able to do that?

"PJ: I don't believe I would.

"THE COURT: All right; would you please stand up and give your name, please ma'am?

"PJ CANNON: Daisy Cannon. And, I just don't believe I could send anyone to the electric chair.

"MR. WATKINS [Prosecutor]: Mrs. Cannon, are you telling the Court that no matter what the evidence is; that if you believe beyond a reasonable doubt and to a moral certainty that this person did it; that if we follow the statute to show that we can prove all the necessary elements, that you would not be able to vote guilty if it meant that he would be sent to death?

"PJ CANNON: I don't think I would."

* * * *

We deem it emphatically clear from the record that both potential jurors were so opposed to capital punishment that they would not be able to vote for the death penalty no matter what the evidence showed. Prospective juror Cannon indicated that she would not be able to return a guilty verdict if it meant the imposition of the death penalty. Prospective juror McCasson indicated that he had a fixed opinion against capital punishment regardless of what the evidence might be. As we perceive Witherspoon, a challenge for cause is permitted in both instances. The court in Witherspoon, supra, n. 21, said:

> "We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. ..." (Emphasis in original)
>
> We hold that the record shows that the two prospective jurors in question were properly excused for valid reasons.

Dobard v. State, 435 So.2d 1338, 1341-1342 (Ala. Cr. App. 1982).

The Alabama Supreme Court affirmed. It correctly stated the applicable principles as follows:

> In Witherspoon the Supreme Court held: "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Id., at 522, 88 S.Ct. at 1777. This position was reaffirmed in Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1972). Consequently, no veniremen may be removed for cause unless it is determined that his views as to capital punishment are so strong that he "would automatically refuse to impose a death sentence regardless of the evidence produced." Liddell v. State, 287 Ala. 299, 251 So.2d 601, 610 (1971).

Ex parte Dobard, 435 So.2d 1351, 1355 (Ala. 1983). After applying those principles to the facts, the Alabama Supreme Court concluded:

> The court finds it difficult to envision how either prospective juror could have been more explicit in expressing an unqualified opposition to the death penalty. Accordingly, under Witherspoon and Liddell, prospective jurors Cannon and McCasson were properly removed for cause.

Id., at 1356. That decision was correct.

Juror Cannon did make it "unmistakably clear" that she would "automatically" vote against the imposition of capital punishment regardless of the evidence. In Darden v. Wainwright, 669 F. 2d 1031, 1038 (11th Cir. 1983), vacated pending en banc consideration, No. 81-5590 (11th Cir. Sept. 1, 1983), the federal appeals court upheld the removal of a prospective juror who stated "I believe I would" be unwilling to return a death sentence verdict. The facts in this case are even stronger for removal. Juror Cannon stated that "I don't believe I would" and "I don't think I would" be able to vote guilty in this case regardless of the proof, and explained "I just don't believe I could send anyone to the electric chair." See p. 7 of this brief, above.

True, juror Cannon's answer was not a simple "no." However, considering the context in which her answer was given, it evidenced as little ambiguity as a one syllable answer would have. As the Eleventh Circuit panel in Darden explained:

> scrutiny of the cold record must not, however, treat the words of prospective jurors as free floating icebergs unrelated to the voir dire examination as a whole. The standards of veniremen...like all statements, must be examined and interpreted in the context in which they occurred.

699 F.2d at 1038. Prospective juror Cannon's statement that, "I just don't believe I could ever send anyone to the electric chair," was an explanation of why she would automatically vote against capital punishment in every case. It was not an equivocation.

More fundamentally, even if the state appellate courts ruled incorrectly on this issue — and they did not — the petition should be denied. This Court certainly does not need to be reminded of its incredible caseload, nor of the fact that it is simply impossible for this Court to review every decision of a lower court which it might perceive to be incorrect. Even petitioner's own assertions prove that such

review is unnecessary. If, as he says, the result in this case is contrary to the result which Eleventh Circuit precedent dictates, see Pet. at 17-18, then the error he perceives will be remedied in a 28 U.S.C. §2254 proceeding. Under Barefoot v. Estelle, 103 S. Ct. 3383 (1983), petitioner will be granted a further stay of execution pending consideration of his claim in the collateral proceeding which will be filed in federal district court as soon as certiorari is denied by this Court.

Moreover, petitioner's argument about why this case is certiorari worthy is illogical. He asserts that four times in the past fifteen years this Court has addressed his concerns and that "the message has been unmistakably clear," Pet. at 13, constituting "an unwavering mandate from this Court," Pet. at 14. Yet, he asks the Court to go at it again, to clarify what he says is already "unmistakably clear." This Court does not have sufficient resources to repeat what petitioner claims it has said four times already.

If there has been a difficulty in applying this Court's rulings in this area, that difficulty stems from the nature of the personal feelings being inquired about and the nature of the English language. All petitioner can suggest is formula questions and talismanic responses. They belong to the realm of religious liturgy, not to the law. The problems surrounding application of Witherspoon are not problems which will profit from a further journey by this Court over already much explored terrain. Four "unwavering mandate(s)" from this Court are enough.

III. THE SEQUESTRATION AND ASSASSINATION NEWS STORY ISSUE IS NOT AN APPROPRIATE ONE FOR CERTIORARI

On pp. 21 - 28 of the petition, petitioner contends that this Court should grant certiorari to review certain issues arising out of the fact that members of the jury viewed news

accounts of the attempted assassination of President Reagan. The Alabama Court of Criminal Appeals addressed the issues petitioner raised in that court concerning this matter as follows:

> Appellant contends that the jury's exposure to the media coverage of the assassination attempt on the life of the President of the United States, which attempt occurred during the trial of the case, was prejudicial to appellant's due process and equal protection guarantees and his right to a fair trial. Appellant urges that the trial court erred to a reversal in denying the motion for a new trial on this ground.
>
> The issue, of course, is not whether the exposure to the media coverage improperly influenced any member of the jury, but whether it might have unduly affected any juror to act outside the evidence in arriving at a verdict. Seekers v. State, 35 Ala.App. 40, 44 So.2d 628 (1949).
>
> The guilt phase of the trial was begun on March 30, 1981, and was concluded March 31, 1981. The sentencing phase was held on the succeeding day, April 1, 1981. The presidential assassination attempt occurred on March 30, 1981, the first day of the trial.
>
> At the conclusion of the sentencing phase and after the jury had returned its verdict, appellant requested a polling of the jury to determine whether the jurors had been permitted to watch television coverage of the assassination attempt or to read newspaper articles about it. The trial court denied the jury polling request but stated for the record that the jurors had seen the television reports.
>
> Appellant relies heavily on Seekers, supra, in furtherance of his position. Seekers is readily distinguished from this case. In Seekers, the jury, during an overnight recess, attended a rather gory movie; there were a number of coincidental similarities between the plot of that movie and the evidence presented in the case the jury was then hearing. One of the affidavits in the motion for a new trial in Seekers alluded to the similarities as follows:
>
> > "...The portrayals of death and suffering in the picture were such that it would have been most difficult for the jurors not to associate the scenes in the show with the testimony in the case. The two trials in which

> the defendants were convicted in the show were quite vividly portrayed and the verdicts rendered against the defendants could hardly have failed to impress the minds of the jurors to the prejudice of the defendant."
>
> In the case at bar, there are no indications of any similarities between matters in the news reports and any of the evidence being considered by the jury.
>
> The news reports obviously contained no communication, information, opinion, or other discussion of any facet of appellant's trial which would tend to affect the ultimate decision in the instant case.
>
> We cannot say that the jury's viewing television news reports of the attempted assassination of the President might have unduly influenced any member of the jury to act outside the scope of the evidence presented in this trial. Consequently, we find no error in the trial court's ruling in that regard.

Dobard v. State, 435 So.2d 1338, 1340-1341 (Ala. Cr. App. 1982).

The Alabama Supreme Court's treatment of the matter was as follows:

> The first issue posed by the petitioner is whether the media coverage surrounding the attempted assassination of President Reagan improperly influenced the jury and thereby denied petitioner the right to a fair trial as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.
>
> During the last two days of sequestration, all the members of the jury were allowed to, and did view on television, news accounts of the assassination attempt on President Reagan. The petitioner contends this exposure unlawfully influenced the jury by encouraging them to convict the petitioner. While it is not delineated in the record precisely which news accounts the jury actually viewed, the petitioner claims the news accounts were riddled with editorialization. The subliminal message allegedly transmitted to viewers was that something was wrong with America and Americans must take action. The available course of action for the jury, argues the petitioner, was to convict the petitioner of a capital crime. In support of this argument the petitioner relies principally upon the doctrine of Seekers v. State, 35 Ala.App 40, 44 So.2d 628, cert. denied, 253 Ala. 420, 44 So.2d 633 (1949).

In Seekers the jury was taken to a movie which bore striking similarities to the case being tried. The crime charged, and that portrayed in the movie, were both of a violent nature. The location of the victim's wounds in both instances was the same. Earlier that day, the jury had heard medical testimony concerning the wounds. Lastly, the film presented detailed accounts of the trial and convictions of the villains. Considering the similarities between the film and the trial, the court noted: "We would be compelled to enter into the realm of speculation, conjecture and surmise to hold that by witnessing the performance the jury was not unduly influenced against the interests of the accused." Seekers, supra.

Seekers and the case at bar, however, are distinguishable. Other than the violent nature of the crimes involved, the assassination attempt and petitioner's case bear few if any similarities. This court does not find that the news accounts complained of influenced the jury in the present case. Similarly, this court does not find that television coverage of the event influenced the jury through editorialization to the extent shown by Styles v. State, 129 Ga.425, 59 S.E. 249 (1907), as petitioner contends.

In Styles, the jury, while sitting for a murder case, was permitted to read an editorial criticizing jurors for their reluctance to convict murderers. The obvious impact and influence such an editorial could promulgate is not present here. Whatever "editorial message" the jurors in this case could have gleaned from the news accounts of the attempts on President Reagan's life was certainly unrelated and detached from their deliberations about this case. To hold otherwise would be to delve into boundless speculation.

"The test of vitiating influence is not that it did influence a member of the jury to act without evidence, but that it might have unlawfully influenced that juror and others with whom he deliberated, and might have unlawfully influenced its verdict rendered." Roan v. State, 225 Ala. 428, 435, 143 So. 454, 460 (1932). We hold the exposure to television coverage of the assassination attempt on President Reagan did not influence the jurors to the extent that they would have acted without evidence. Accordingly, the trial judge properly denied petitioner's motion for a new trial based on these grounds.

Ex parte Dobard, 435 So.2d 1351, 1354 (Ala. 1983).

Recognizing that "Alabama law applies an even stricter test than federal law" in this area, Pet. at 24, much of petitioner's argument to this Court is that the Alabama Supreme Court misapplied state precedents, Pet. at 21, 24; violated principles of "state due process," Pet. at 24; and engaged in an analysis "forbidden by Alabama law," Pet. at 25. Those contentions do not constitute federal questions, and this Court has no jurisdiction to review them. E.g., N.A.A.C.P. v. Claiborne Hardward Co., 102 S. Ct. 3409, 3422 (1982); Fuller v. Oregon, 417 U.S. 40, 42 n. 2 (1974); Mullaney v. Wilbur, 421 U.S. 684, 690-691 (1975); see, Rule 17.

Petitioner's contention that the trial court violated principles of federal due process by failing to poll the jury about whether exposure to news media accounts of the attempted assassination prejudiced them does present a federal question. However, that federal question was not presented to or decided by the state appellate courts below. Instead, petitioner only raised the issue of whether jury exposure to the news media accounts, as reflected in the record, violated due process. See pp. 11 - 13 of this brief, above; see also, Street v. New York, 394 U.S. 576, 582 (1969) ("when...the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."). The question of whether exposure to news media accounts violated due process is different from the question of whether failure to poll the jury to determine the effect of that exposure violated due process. See, Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974); cf., Warden v. Harless, 103 S. Ct. 276, 277 (1982) (per curiam) ("It is not enough that all the facts necessary to support the federal claim were before the state courts...or that a

somewhat similar state law claim was made.") (exhaustion of state remedies issue).

Because the federal question involving the necessity of polling the jury was not presented to or decided by the state appellate courts below, this Court need not decide it, Moore v. Illinois, 408 U.S. 786, 799 (1972), should not decide it, Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974), and has no jurisdiction to decide it, Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); see, 28 U.S.C. §1257(2) and (3); Rule 17.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Edward E. Carnes, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve a copy of tis brief on petitioner by placing a copy in the United States mail, postage prepaid, and properly addressed to his counsel of record as follows:

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I further certify that I have served all parties required to be served.

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